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Before The  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

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MAY 7 1997

Federal Communications Commission  
Office of Secretary

In The Matter Of )  
)  
Rulemaking To Amend Parts 1, 2, 21, )  
and 25 Of the Commission's Rules to )  
Redesignate the 27.5-29.5 GHz Frequency )  
Band, to Reallocate the 29.5-30.0 GHz )  
Frequency Band, to Establish Rules and )  
Policies for Local Multipoint )  
Distribution Service and for Fixed )  
Satellite Services )

CC Docket No. 92-297

To The Commission:

APPLICATION FOR REVIEW

M3 Illinois Telecommunications Corporation ("M3 ITC"), acting through counsel and in accordance with Section 1.106 of the Commission's Rules, 47 C.F.R. §1.106, hereby requests application for review of the Commission's determination in the above-referenced matter denying waiver applications.<sup>1/</sup>

INTRODUCTION

The Commission has denied 971 waiver applications filed on LMDS applications, claiming that granting the applications would result in *de facto* reallocation of the spectrum, and

<sup>1/</sup> Rulemaking To Amend Parts 1, 2, 21, and 25 Of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, CC Docket No. 92-297, FCC 97-82, released March 13, 1997, at paragraph 383 (hereinafter, "Order"). The instant application for review applies to the Order on Reconsideration of waiver application denials, which confirmed denial of 971 waiver applications.

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stating that the grant of these waivers would be contrary to guidance provided by courts.<sup>2/</sup> M3 ITC petitioned for reconsideration of denial of its waiver applications on the basis that its applications were unique in that they proposed service that was wholly local in orientation. M3 ITC's petition for reconsideration was denied in the above-referenced order, and M3 ITC respectfully requests that the Commission re-think this determination.

### **I. CASE LAW SUPPORTS M3 ITC'S POSITION**

The Commission does not have statutory authority to retroactively apply new 28 GHz rules to pending applicants. An administrative agency, absent specific statutory authority, cannot retroactively apply new rules upon parties who engaged in transactions with the agency in good faith reliance upon existing rules. Bowen v. Georgetown University Hospital, 488 U.S. 203 (1988); Health Insurance Ass'n of America v. Donna E. Shalala, 23 F.3d 412 (D.C. Cir. 1994). In the case of LMDS applicants, the Commission determined in Hye Crest Management that a standard for waiver would apply. From the enormous number of waiver applications that the Commission received, it is obvious that many communications companies relied on the Commission determination in their planning. These companies have been waiting since 1992 for a determination, and now the Commission has decided to deny their waiver applications. This denial is inconsistent with the case law outlined above, which requires that agency applicants be able to rely on rules promulgated by agencies.

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<sup>2/</sup> Id.

## **II. IT WOULD BE UNFAIR TO TREAT WAIVER APPLICANTS DIFFERENTLY**

The Commission is required to treat similarly situated applicants alike, or to provide an adequate explanation for disparate treatment. Adams Telecom, Inc. v. FCC, 38 F.3d 576, 581 (D.C. Cir. 1994) (citing McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1365 (D.C. Cir. 1993)). See also, Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965). In Hye Crest Management, Inc., 6 FCC Rcd 332 (1991) the Commission found that CellularVision's predecessor-in-interest met the waiver standard as set forth by that case. Thus, the LMDS waiver applicants should be able to expect the treatment received by CellularVision's predecessor-in-interest, and should also receive waivers under the same standard.

## **CONCLUSION**

As more fully set forth in M3 ITC's previously-filed petition for reconsideration, M3 ITC believes that the Commission erred by denying waiver applications in the Order, because the Commission is failing to apply its standards non-discriminatorily. Agency case law and FCC case law both support Commission grant of M3 ITC's waiver applications that were filed in 1992.

Respectfully submitted,

**M3 ILLINOIS TELECOMMUNICATIONS CORP.**

A handwritten signature in dark ink, appearing to read "Janet Fitzpatrick", is written over a horizontal line.

J. Jeffrey Craven

Janet Fitzpatrick

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